

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MRS. JUSTICE K.HEMA

TUESDAY, THE 6TH FEBRUARY 2007 / 17TH MAGHA 1928

Crl.Rev.Pet.No. 539 of 1999()

CRA.211/1997 of III ADDL.SESIONS COURT, ERNAKULAM
CC.607/1996 of JUDL.MAGISTRATE OF FIRST CLASS-II, KOCHI
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REVN. PETITIONER(S):

BABU @ PATTIKUNJU,
S/O.HUSSEIN, ALUNGAL VEETIL,
VELI DESOM, EDAKOCHI VILLAGE,
KOCHI.

BY ADV. SRI.T.H.ABDUL AZEEZ

RESPONDENT(S):

KERALA STATE REP. BY THE CIRCLE INSPECTOR OF
POLICE, PALLURUTHY POLICE STATION.

PUBLIC PROSECUTOR SRI.C.K.SURESH.

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD
ON 06/02/2007 THE COURT ON THE SAME DAY PASSED THE
FOLLOWING:

K.HEMA, J.

Crl.R.P.No.539 of 1999

Dated 6th February, 2007.

J U D G M E N T

The conviction and sentence passed against revision petitioner under Sections 457, 380 and 34 of the Indian Penal Code are under challenge in this revision. Revision petitioner is the first accused in the case.

2. According to prosecution, on 30.12.1995 at 12.00 midnight, the revision petitioner along with co-accused, in furtherance of common intention, committed house breaking in order to commit theft and also committed theft of a stereo, television, 15 cassettes, gold ornaments and other materials, which include MO1 to MO3, worth Rs.27,250/- from the house of PW1, where she was residing.

3. To prove the prosecution case, PW1 to PW8 were examined and Exts.P1 to P7 and MO1 to MO6 were marked. The trial court on analysis of the evidence found that MO1 to MO3 were recovered pursuant to an information gathered from first accused and convicted both the accused for offences under Sections 457, 380 and 34 of Indian Penal Code. But, the lower

appellate court acquitted the second accused and confirmed the conviction and sentence passed against the first accused, who is the revision petitioner.

4. According to lower appellate court, the confession statement Ext.P4(a) made by first accused led to the recovery of MO1 to MO3, which were stolen from the house of PW1 and PW2. The conviction was mainly based on a statement given by the revision petitioner which the court found was relevant under Section 27 of the Evidence Act.

5. The revision petitioner who is the first accused was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.1,500/- and in default to undergo simple imprisonment for six months under Section 457 IPC. He was also sentenced to undergo rigorous imprisonment for six months and to pay a fine of Rs.1,000/- and in default to undergo simple imprisonment for six months under Section 380 IPC. The sentences are ordered to run concurrently. Set off was also allowed.

6. Heard. The alleged stolen articles in this case are

MO1 to MO4 and MO6, stereo, television cassettes, gold ingot etc. PW1 identified these articles as those stolen from her possession. PW1 deposed that certain articles were stolen from her possession. MO4 is the ingot which was made out of the ornaments on melting them. The prosecution case is that MO1 and MO3 series were seized from the possession of the revision petitioner and Mos.2 and 4 were seized pursuant to a statement given by the revision petitioner to PW8 police officer, which was produced by one Thaha.

7. PW8 gave evidence that the accused was arrested on 15.2.1996 at 9.30 a.m. while he was working as a Sub Inspector. According to him, he saw youngsters walking with a tape recorder and on suspicion, he arrested them and seized the tape recorder under a mahazar, Ext.P3. In Ext.P3, a general reference is made that the tape recorder was seized from the possession of the "accused". From which of the accused it was seized is not stated. Therefore, the revision petitioner cannot be stated to be in possession of MO1 on the basis of the solitary piece of evidence of PW8. Though PW3

was examined and the recovery mahazar, Ext.P3 was marked through him, he did not state that MO1 was taken from possession of the accused at the time and place alleged by prosecution.

8. PW1 deposed in cross examination that the stereo was produced by Thaha before the police station and she was also present there when it was produced. The prosecution has no case that the stereo set was seized as produced by Thaha. PW3, the sole witness to the seizure was declared as hostile. In the nature of evidence by PW8 regarding the seizure of MO1, I find that the revision petitioner cannot be made liable for the alleged possession of the stolen article MO1, especially in the absence of satisfactory corroborating evidence. Even the contemporaneous document Ext.P3 does not support the evidence given by PW8 that MO1 was recovered from the physical possession of the revision petitioner. The fact that MO1 was seized from the revision petitioner has not been established beyond reasonable doubt and hence he cannot be found guilty for committing theft of MO1.

9. The lower appellate court entered a finding that Ext.P4(a), confession statement of the revision petitioner had led to the recovery of MO1 to MO3, and it satisfies the requirements of Section 27 of the Evidence Act. It was also held that the recovery was proved and that MO1 to MO3 were recovered pursuant to the information gathered from the first accused. This finding is totally contradictory to the evidence and even the prosecution case. The prosecution has no case that MO1 was seized pursuant to a statement given by the accused, which is relevant under Section 27 of the Act. The definite case of the prosecution is that MO1 was seized from the possession of the accused, without specifying from which of the accused such recovery was made. Therefore, the lower appellate court has misread the evidence and findings regarding the seizure of MO1 are unsustainable.

10. The lower appellate court also found that Ext.P4 (a) confession statement of the revision petitioner led to the recovery of MO2 and MO3 and that such statement satisfies the requirements of Section 27 of the Act. The statement of

accused is recorded in Ext.P4 mahazar. But, as rightly pointed out by the learned counsel appearing for revision petitioner, the statement is not recorded in the first person. Reliance can be placed on a confession statement only if it is recorded in the first person. The fact that Ext.P4 is a statement which can be relied upon under Section 27 of the Act is also not sustainable.

11. Even otherwise, PW8 gave evidence that the accused made a confession and pursuant to the confession he had gone to one Thaha, who produced a television, gold ornaments and audio cassettes. But, the articles allegedly seized from Thaha by PW8 are not marked or identified by PW8. It cannot be said that the stolen articles MO2 and MO3 which are identified by PW1 are the articles which were seized, as produced by Thaha, since those articles are not identified by PW8 in court.

12. The court cannot act on surmises and hold that articles seized were the articles which were stolen from the possession of PW1, in the absence of evidence to support such finding. The case of PW8 is that gold ornaments were seized as

produced by Thaha. But he specifically mentioned that the articles produced and seized include “gold ornaments”. However, no such gold ornaments are produced in court. PW8 has also not identified any gold ornaments allegedly under Ext.P4 as produced by Thaha. Therefore, evidence is shabby with respect to the recovery of MO1 to MO4.

13. The lower appellate court has not considered the evidence on recovery of MO4, the gold ingot. At any rate, the finding of the lower appellate court that MO1, the stereo tape recorder was seized pursuant to a confession statement Ext.P4 (a) at the instance of the accused is totally wrong and not supported by evidence. The finding that MO2 and MO3 were seized as per a statement given by the accused which is relevant under Section 27 of the Act is also unsustainable since the exact statement which is allegedly given by the accused is not there in evidence. Whatever is recorded in Ext.P4(a) is only gist of an alleged statement, which cannot be said to be a statement relevant under Section 27 of the Act.

14. It is also relevant to note that though the lower

appellate court convicted the revision petitioner with the aid of Section 34 IPC, no discussion is made as to which of the accused committed substantive offences alleged by the prosecution. It is also relevant to note that no discussion is made regarding the evidence which discloses the offence under Section 457 IPC. In the absence of any finding, conviction and sentence passed for offence under Section 457 are also not sustainable.

15. The conviction and sentence passed against the revision petitioner are therefore, unsustainable and those are set aside. The accused is found not guilty of offences under Sections 457, 380 and 34 of IPC and he is acquitted of the said offences. He is set at liberty forthwith.

This revision petition is allowed.

K.HEMA, JUDGE.

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